IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22627

PORT ANGELES TELECABLE, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

This case arises from a memorandum opinion and order of the Federal Communications Commission, released January 23, 1968, denying petitioner's request for waiver of section 74.1103(e) of the Commission's rules dealing with the regulation of community antenna television systems. The petition for review was filed under section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. section 402(a). Jurisdiction of this court rests on section 2 of the Judicial Review Act, 28 U.S.C. section 2342. Venue in this judicial circuit is based on 28 U.S.C. section 2343.

COUNTERSTATEMENT OF THE CASE

Many of the basic facts are not in dispute: Port Angeles Telecable, Inc , operates a CATV system in Port Angeles, Washington, which currently carries eight television signals. Three of these emanate from Canadian stations, four from Seattle stations and the eighth from KVOS-TV, Bellingham, Washington. The CATV system receives and amplifies these signals and distributes them to subscribers homes for a monthly fee.

Under section 74.1103 of the Commission's rules, 47 CFR section 74.1103, CATV systems must refrain from duplicating on the same day any program broadcast by a station entitled to priority and non-duplication protection as against the signal of the duplicating station. In this case KVOS-TV, in Bellingham, requested that Port Angeles provide it with protection against program duplication through the carriage of KIRO-TV, Seattle, which is affiliated with CBS, the same network with which KVOS-TV is affiliated.[1/] Under the rules, KVOS is entitled to this protection because it places a stronger signal over Port Angeles than any of the Seattle stations. In other words, whenever KVOS-TV and KIRO-TV broadcast the same programming within a 24 hour period, and both channels are being carried on the CATV, the signals of KIRO-TV must be deleted, in order to provide KVOS-TV with exclusivity in the presentation of that duplicated programming.[1-A/]

1/ Some question was also raised about KING-TV, Seattle, an NBC affiliate, since KVOS-TV carries some NBC programming (R. 0005-0006).

1-A/ There are, however, some limitations on this general principle. See infra, pp. 4-5

As it was entitled to do under the Commission's rules, Port Angeles declined immediately to honor KVOS-TV's request, and instead sought a waiver of the rule. In order to better understand the Commission's rejection of the requested waiver, a brief summary of the reasons for the rule follows.[2/]

1. The Non-Duplication Rule

The rule in question, section 74.1103, was adopted in the Second Report and Order, 2 F.C.C. 2d 725 (1966), in order to assure that the developing CATV industry would not be destructive of the existing television allocation scheme. After carefully reviewing the recent growth of the CATV industry, the Commission found that in the nature of things the competition between CATV and the broadcaster was not inherently fair, 2 F.C.C. 2d at 778-779. A television station normally obtains the right to exhibit non-network programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. The amount and kind of exclusivity that can be

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2/ In numerous briefs previously filed in this court we have set out at great length the background considerations on which the Commission relied in adopting its present CATV rules, and we do not believe any purpose would be served by repeating those expositions here. Reference is made to respondents' brief filed in Southwestern Cable Co. v. F.C.C. and U.S., 378 F.2d 118 (Case Nos. 21,183, 21,192) cert. granted 389 U.S. 911; respondents' brief in Total Telecable, Inc. v. F.C.C. and U.S., Case No. 21,990. See also respondents' brief in Great Falls Community TV Cable Co., Inc. v. F.C.C. and U.S., Case No. 22,393.

created is restricted by the antitrust laws, but those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process.

CATV systems presently stand outside this distribution process. They do not compete for network affiliation, nor for access to syndicated programs, feature films, or sports events. They are not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier -- although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement. The non-duplication rule attempts to correct this imbalance. It simply requires that when the same program is being broadcast on the same day by two or more stations whose signals are received by the system, preference must be given the local station through the deletion of the more distant station's signal.

This non-duplication protection applies to "prime time" network programs (i.e., those presented by the network between

6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Furthermore, a local station is only entitled to non-duplication protection on a cable system "against lower priority or more distant duplicating signals, but not against signals of equal priority * * *."[3/] Section 74.1103(e). Finally, the CATV system need not delete reception of a network program if, in doing so, it would leave available for reception of subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program. Section 74.1103(g).

2. The Petition For Waiver

The most important ground advanced by Port Angeles in support of its waiver request was the allegation that Port Angeles is a Seattle and not a Bellingham, suburb, and that its residents are therefore more closely tied to Seattle than to Bellingham (R. 0001-0005). Port Angeles also argued that since KVOS-TV derives much of its revenues from the Canadian areas and populations it is able to serve, it would not be prejudiced by a grant of the

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3/ Under the rule, television signals are divided into four priorities in terms of signal strength: (1) principal community, (2) Grade A, (3) Grade B, and (4) translator stations. The Commission classifies television service areas into two grades:

"Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of this service. In the case of Grade B service, the figures are 90% of the time and 50% of the locations." Sixth Report and Order, 1 Pike & Fischer, R.R. 91:601 at 630 (1952). Cf., Clarksburg Publishing Co. v. F.C.C., 96 U.S. App. D.C. 211, 215-216 n. 12, 225 F.2d 511, 515-16 n. 12 (1955).

requested waiver.

The Commission declined to waive the rule, concluding that the contentions were largely conclusionary in nature:

> No facts are alleged in support of the claims that the people of Port Angeles are "dependent upon Seattle in all regards" and that "Seattle advertisers cater to the Port Angeles market" while [Bellingham] advertisers do not. (R. 0015)

The Commission went on to note that even if these allegations were true, they were not sufficient to justify a waiver. It noted that compliance with the rules involved no more than the deletion of the network programming of KIRO, and that this deletion would occur only when KIRO was carrying network programming being carried in prime time within 24 hours by KVOS. It also noted that some KING-TV network programming might also have to be deleted because KVOS carried an unspecified amount of NBC programming, as does KING. The Commission observed that to the viewing public the availability of identical programming on two channels is of little practical significance.

The Commission also found that Port Angeles' arguments concerning service by KVOS to Canadian audiences and reliance by KVOS on Canadian revenues were unsupported and irrelevant, noting that KVOS is primarily an American station, and is licensed to operate as one.

Finally, the contention that KVOS would not be prejudiced was rejected. Finding that KVOS came within the protection require-

ments set out in the rules, the Commission noted that in its Second Report and Order, 2 F.C.C. 2d 725 (1966), it had found that stations situated like KVOS were entitled to limited protection of the program exclusivity for which they have bargained through the deletion of more distant programs duplicating their own. "It would be disruptive of KVOS-TV's audience in Port Angeles for its network programming to continue to permit that programming to be duplicated from Seattle. Our Second Report explains the reasons for requiring program exclusivity and Telecable has not shown that these reasons are not fully applicable here." (R. 0016)

Following denial of its waiver request, Port Angeles filed its Petition for Review in this court.

STATEMENT OF QUESTIONS PRESENTED

In respondents' view, the following questions are presented:

Whether the Commission acted reasonably and within its discretion in declining to grant Port Angeles a waiver of the CATV non-duplication rule.

Respondents believe that as to all the remaining issues raised in this case, a threshold question is presented, i.e.,

Whether section 405 of the Communications Act, 47 U.S.C. section 405, bars review of claims of error which were not presented to the agency.

If the Court should find that the issues raised by Port Angeles for the first time in this Court are properly before it, we believe the further questions presented may be stated as follows:

Whether the Commission has the authority to regulate nonmicrowave CATV systems.

Whether the nonduplication rule involves an illegal taking of property without due process of law.

Whether petitioner was constitutionally or by statute entitled to a hearing.

Whether the nonduplication rule is discriminatory or contravenes other Congressional purposes.

ARGUMENT

I. THE COMMISSION PROPERLY DECLINED TO WAIVE THE NON-DUPLICATION RULE.

There is no dispute that the non-duplication rule applies to the factual situation presented in this case. KVOS-TV, the station requesting non-duplication protection, places a predicted Grade A signal over Port Angeles, whereas the duplicating Seattle stations place only a predicted Grade B signal;[4/] accordingly, under the rule, KVOS-TV is entitled to protection against any Seattle signal which duplicates its own programming. Port Angeles argues, however (Br., pp. 53-57) that the Commission erred in refusing to waive the rule because KVOS-TV failed to show that it would be adversely affected if the waiver were granted.[5/] This reasoning totally misapprehends the operation of a waiver provision.

Contrary to Port Angeles' contention, the burden on the injury question plainly falls on the party seeking an exemption from the ordinary operation of the rule. In its request for waiver, Port Angeles did little more than allege that KVOS-TV would not be injured by grant of the requested relief (R. 0004-0006). There can be no question, however, that at the least a substantial portion of KVOS-TV's revenue depends on American audiences. Accordingly, Port Angeles' presentation is totally inadequate under

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4/ Port Angeles' argument (Br., p. 23) that the record fails to show which signal is stronger is disingenuous at best. In the absence of any evidence that the predicted signal strengths are not in fact present, there was no reason to question the greater strength of the KVOS-TV signal.

5/ The text of the rule is appended hereto as Appendix A-1.

section 74.1109 of the rules concerning waiver petitions:

> (c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.

Plainly, Port Angeles' brief, conclusionary allegations did not measure up to this requirement.[6/] See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), in which the Supreme Court held that waiver requests must be accompanied by reasons, sufficient if true, to justify a change or waiver of the rule in question. See also Federal Power Commission v. Texaco, 377 U.S. 33 (1964).

Nor is Port Angeles' reliance on Presque Isle TV Co., Inc. v. United States, 387 F.2d 502 (1st Cir., 1967) helpful to it here. In Presque Isle, the Commission was dealing with a unique factual situation to which it had not specifically addressed itself in the rule making and, accordingly, the Court held that the record demonstrated insufficient policy determinations to support the ad hoc result reached there. Here, on the contrary, the Commission has already reached a determination which by its own terms covers precisely the fact situation presented in this case.

6/ In Channel 9 Syracuse, Inc. v. F.C.C., 385 F.2d 969 (D.C. Cir. 1967), the Court said: "We do suggest, however, that in the emerging field of CATV, with respect to petitions for waiver of evidentiary hearings, the Commission should require greater factual specificity in petitions for waiver and in the proof . . ." Id at 975.

Accordingly, petitioner here had a much heavier burden in establishing justification for the relief sought. In any event, a more complete showing in this respect would have been unavailing because the policy determinations on which the rule is based do not turn on individual economic circumstances.

The Commission's non-duplication rule is based on the finding made in a rule making proceeding that "every station affected is entitled to appropriate carriage and non-duplication benefits, irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station." First Report and Order, 38 F.C.C. 683, 713 (1965). The Commission explained this reasoning at great length (38 F.C.C. at 713-714):

> [W]e believe that the imposition of minimum carriage and nonduplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential. NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. . . This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." United States v. Detroit Navigation Co., 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of ensuring the healthy growth and maintenance of the basic service.

Indeed, it is frequently true that individual systems serving a limited number of subscribers pose no immediate threat to a station's viability. But it would be folly for the Commission to fragment the problem this way. Where, as the Commission found with respect to CATV, growth was occurring at a rapid rate and a potential for harm was shown, the fact that a particular system might show that its operation poses no immediate threat to an existing station is hardly sufficient to warrant an exemption. 7/

Similarly, Port Angeles failed to demonstrate that the cultural and economic ties between Port Angeles and Seattle were more significant than those between Port Angeles and Bellingham or that KVOS-TV was not responsive to the needs and interests of the Port Angeles viewers Indeed, the eighteen page record below readily demonstrates that petitioner laid before the Commission nothing but bare assertions as to the orientation of the Port Angeles viewers and their relationship to KVOS-TV.

7/ Significantly, this Court has already considered another proceeding in which a CATV system had refused to provide KVOS-TV with nonduplication protection. Total Telecable, Inc. v. F.C.C. and U.S.A. (Case No. 21,990) held in abeyance by order dated November 28, 1967.

II. SECTION 405 OF THE COMMUNICATIONS ACT PRECLUDES REVIEW OF CONTENTIONS NOT RAISED BEFORE THE COMMISSION. SINCE MANY OF PETITIONER'S ARGUMENTS WERE NOT RAISED BELOW, THEY ARE NOT PROPERLY BEFORE THE COURT.

In its brief Port Angeles has launched a wide ranging general attack on the Commission's jurisdiction to regulate CATV, the validity of the Commission's regulations, and the procedure followed below. Before the Commission it raised none of these contentions. Rather, it attempted to justify a waiver of the non-duplication rule based upon alleged lack of ties between the station requesting non-duplication protection and the community of the CATV, and the alleged lack of prejudice to the station if the rule were waived (R. 0001-0008). Port Angeles is therefore precluded from raising the broad issues for the first time on appeal.

Section 405 of the Communications Act, 47 U.S.C. §405, unequivocally establishes that no "question of fact or law" may be raised on appeal which petitioner has not first raised before the Commission.[8/] See also United States v. Tucker Truck Lines,

8/ In pertinent part 47 U.S.C. 405 states:

> A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of . . . . The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

344 U.S. 33 (1952); Unemployment Commission v. Aragon, 329 U.S. 143, 155 (1946); Albertson v. F.C.C., 243 F.2d 209 (D.C. Cir., 1957); Florida Gulfcoast Broadcasters v. F.C.C., 352 F.2d 726 (D.C. Cir., 196[illegible]

In view of these authorities, it is clear beyond question that all of Port Angeles' claims, except for those dealing with the specific application of the rule in this case, are outside the scope of this appeal. The record below is silent on the broad issues argued in Port Angeles' brief since they were not asserted by petitioner and there is therefore nothing for this Court to review. Indeed, even as to the question of the Commission's jurisdiction (Br. pp. 10-40), it has been held that 47 U.S.C. §405 requires as a condition precedent to judicial review that the matter be raised before the agency. Presque Isle TV Co., Inc. v. United States, supra, at 504-506.

In that case the First Circuit held that a claim that the Commission lacks jurisdiction to regulate CATV was not properly before it because it had not been expressly presented to the Commission. After reviewing the relevant authorities in considerable detail, the Court concluded:

> We hold that even though the question of statutory interpretation was, strictly, a jurisdictional matter, it was a question of law which petitioners were obliged to raise ab initio. We believe that section 405 calls for this result and that no constitutional principles or public policy require us to construe it otherwise. 387 F.2d at 506

We respectfully submit that this reasoning is equally applicable here,

and that petitioner's claim that the Commission has no jurisdiction over its system cannot be considered now.[9/]

The only question the Commission passed on in this case was whether a waiver of the non-duplication rule should be granted. The Commission held in essence that the contentions offered in justification of a waiver were simply inadequate to overcome the general policy determinations reached in the rule making. This conclusion has been dealt with in Argument I, supra.

The remaining sections of this brief deal seriatim with the broad issues raised by petitioner. They need be considered only if the Court is of the view that these issues are properly raised at this time.[10/]

III. THE COMMISSION HAS THE AUTHORITY TO REQUIRE PETITIONER TO DELETE PROGRAMS BROUGHT IN FROM LOWER PRIORITY STATIONS ON THE SAME DAY THAT THESE PROGRAMS ARE BEING CARRIED OVER LOCAL STATIONS.

Port Angeles argues that the Commission lacks authority to regulate nonmicrowave CATV systems (Br., pp. 26-52). Admittedly, as Port Angeles is a nonmicrowave operator, it is not

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9/ Throughout its argument, Port Angeles notes that these issues were raised in the prior rule making which led to the adoption of the rule, and that, through its membership in a trade association which participated therein, petitioner presented its views to the agency. In view of the unequivocal language of section 405, however, this prior participation is not sufficient. United States v. Tucker Truck Lines, Inc., supra; Presque Isle, supra, at 505 n.4.

10/ Because petitioner has intermixed and proliferated its various arguments, it has proven impossible to deal with them in a form which appears to be responsive to the argument headings in petitioner's brief. We believe, however, that we have dealt herein with every substantial point raised by petitioner.

required to file any applications for authority to operate with the Commission, and is not subject to its jurisdiction as a licensee.

In Southwestern Cable Co. v. U.S., 378 F.2d 118 (1967), this Court held that the Commission's authority may be "exercised only against licensees or applicants." Since CATVs fall in neither category, the Court set aside a Commission order limiting the expansion of CATV systems in San Diego pending a hearing before the agency.[11] The Supreme Court granted the Government's petition for a writ of certiorari and the case has been briefed and argued. The major issue concerns the Commission's jurisdiction over CATV systems not served by microwave radio facilities, and it is anticipated that a decision will be forthcoming during this term of Court. A decision upholding the Commission's jurisdiction would be dispositive of the contentions raised by petitioner here. On the other hand, a decision adverse to the Commission on the jurisdictional issue would render the present appeal moot. Accordingly, we believe it is unnecessary to brief the jurisdictional issue at this time.[12]

11/ But see Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 220 (D.C. Cir., 1967), where it was held that CATV "as a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme" is subject to Commission authority.

12/ In briefs previously filed in this court we have set out our view of this issue at great length. See n. 2, supra.

IV. THE NON-DUPLICATION RULE DOES NOT INVOLVE AN ILLEGAL TAKING OF PROPERTY. PORT ANGELES HAD NO STATUTORY OR OTHER R GHT TO A HEARING.

Port Angeles suggests (Br., pp. 56-7) that the alleged loss of subscribers and additional expense, brought about by operation of the non-duplication rule, is a taking of property without due process of law. It also argues (Br., pp. 57-58) that since it was engaged in its present activities prior to the adoption of the rules, it is a denial of due process to force it to comply with the restrictions imposed by the CATV rules.

We believe these arguments are without force. As we have discussed above, the non-duplication rule is designed to carry out the valid objective of imposing upon CATV systems that degree of regulation which will insure that CATV service will be of maximum benefit in distributing television signals to the American public without destroying the basic television service which gives them their substance:

> For its survival, of course, a station needs financial support. Commercial advertisements are a chief source and these are attracted by the number of a station's viewers, for they are the advertisers' prospective customers. Consequently, to insure its permanence a station is entitled to some protection against dilution of its coverage through CATV's introduction of the same programs from more removed stations. In weighing the hu.t to CATV against the help to TV, there are several considerations besides the hope of preserving the station as a local and national asset. One is the fact that the local station is put to substantial expense in procuring programs, while CATV has so far been able to use them without sharing this burden.

> On balance, we cannot say the Commission has not been impartial in fulfilling its obligations. Neither the rules nor their administration are shown to be unjust, including the particular rule now in suit. Seemingly, it represents a fair adjustment and accommodation of conflicting claims to first place in the public interest. Cf. Channel 9 Syracuse, Inc. v. FCC, supra, 385 F.2d 969, 971, and Carter Mountain Transmission Corp. v. FCC, supra, 321 F.2d 359, 363, cert. den. 375 US 951. The Commission's order is an evenhanded and justified execution of this policy . . . (Footnote omitted) Wheeling Antenna Co., Inc. v. U.S. and F.C.C., ___ F.2d ___ (4th Cir., decided February 28, 1968)

Petitioner's argument as to deprivation of property was disposed of as long ago as 1932 in connection with the functions of the Radio Commission. At that time in Trinity Methodist Church South v. Federal Radio Commission, 62 F.2d 850, 852 (D.C. Cir., 1932), cert. den. 288 U.S. 599, the Court, citing Chicago B. & Q. R. Co. v Illinois, 200 U.S. 561, 593, stated:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury does not attach under the Constitution.
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> . .
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> When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether restrictive measures are reasonably adapted to secure the purposes and objects of regulation If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not unconstitutional taking of property without compensation or without due process of law" Atlantic Coast Line R. Co v. Goldsboro, 232 U.S. 548, 558 Cf. Reinman v. Little Rock, 237 U.S. 171 (1915), Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

And as the Supreme Court stated in Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 282 (1933):

> * * * This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises.

Thus, assuming that the Commission's promulgation of its CATV rules was a proper exercise of its statutory authority, their operation does not invade those rights of petitioner protected by Constitutional guarantees.[13/]

Closely related to the last argument is Port Angeles' contention that it was entitled to a hearing under relevant provisions of the Communications Act of 1934, as amended, and general principles of due process (Br., pp. 61-65). We emphasize again that no request for a hearing was ever made before the agency. Specifically, Port Angeles argues (Br., pp. 61-63) that it is entitled to a statutory hearing under section 309(e) of the Communications Act, 47 U.S.C. section 309(e), which calls for a hearing upon any application for a license which presents a substantial and material question of fact. We believe Port Angeles' argument is unpersuasive. Dealing with precisely the

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13/ We recognize, however, that Judge Ely has taken a contrary position in his concurrence in Southwestern Cable Co., supra.

same argument that petitioners make here, the Tenth Circuit stated in Conley Electronics Corp. v. U.S. and F.C.C., ___ F.2d ___ (10th Cir., decided April 22, 1968): "The short answer is that [petitioner], by its own admission, is neither an applicant for a license nor a licensee. It is clear, therefore, that the various statutory provisions relied upon are inapplicable by their own terms." Slip Op. pp. 9-10.

Furthermore, the law is quite clear that aside from the statutory hearing rights asserted, Port Angeles is not automatically entitled to a hearing on its request for exemption from an across the board rule, and this is equally true of licensees requesting waivers under the licensing provisions of the Communications Act.[14/] Similar claims by CATV systems have been rejected recently in two different circuits.

In Wheeling Antenna Cable Co. v. U.S. and F.C.C., ___ F.2d ___ (4th Cir., February 28, 1968), the Court rejected a CATV system's complaint of the Commission's denial of a hearing on a waiver request:

> At its option the Commission may, as it did here, adjudicate by reference to a pertinent general rule. Cf. Securities Comm'n v. Chenery Corp., 332 US 194, 203 (1947). In the present circumstances no hearing was demandable. FPC v. Texaco, Inc., 377 US 33, 44 (1964); United States v. Storer Broadcasting Co., 351 US 192, 205 (1956). Otherwise, the Commission would be intolerably and impractically embroiled in a multiplicity of trials. This does not mean, of course, that a petitioner goes unheard. It means only that a Commission may

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14/ See United States v. Storer Broadcasting Co., supra; Cf. WBEN, Inc. v. U.S. and F.C.C. (2nd Cir., ___ F.2d ___, decided May 10, 1968), Slip Op., pp. 2246-2247.

> make its judgment on the petitioner's papers. The decision then becomes reviewable in whatever manner the statute may permit.

And in Conley Electronics Corporation v. U.S. and F.C.C., supra, the Court, rejecting an argument virtually on all fours with that of Port Angeles here, quoted the following language from Airline Pilots Assn., Int'l v. Quesada, 276 F.2d 892 (2nd Cir., 1960):

> "Nor does the regulation violate due process because it modifies pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. See United States v. Storer Broadcasting Co., supra; Bowles v. Willingham, 1944, 321 U.S. 502, 519-520 * * *. Obviously, unless the incidential limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the courts, and each pilot whose license was affected--here some 18,000--might demand to be heard individually. * * * All private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest." Id. at 896. Conley Electronics, supra, Slip Op., pp. 13-14.

The restrictions to which Port Angeles is now subject were imposed after a rulemaking proceeding in which all the legal and policy issues were fully explored. Petitioner had every procedural opportunity to which it is entitled to participate in that rule making, and did so through its participation in a trade association which filed comments with the Commission. If the rules are free of substantive and procedural infirmity, their application

to Port Angeles, and the consequent economic burden on it, does not amount to a deprivation of property under the Fifth Amendment to the Constitution notwithstanding the absence of an individual adjudicatory hearing. Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915); California Citizens Band Assoc. v. U.S. and F.C.C., 375 F.2d 43 (9th Cir., 1967), cert. denied, 389 U.S. 844; American Airlines v. C.A.B., 359 F.2d 624 (D.C. Cir., 1966), cert. denied, 385 U.S. 834; Superior Oil Co. v. Federal Power Commission, 322 F.2d 601 (9th Cir., 1965); Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir., 1949), cert. denied, 338 U.S. 860.

Finally, we emphasize that the effect on Port Angeles is minimal: it must delete one, and as the record suggests, on occasion two, of the eight signals which it currently carries on its cable. The public will not be deprived of a single program since the only effect of the rule is to avoid duplication of the very same programming on two channels within a 24 hour period. Any locally produced Seattle programming may be carried by Port Angeles as it will not duplicate KVOS-TV programming of a local (Bellingham) or network origin.

V. THE NON-DUPLICATION RULE IS NON-DISCRIMINATORY AND CONTRAVENES NO OTHER CONGRESSIONAL POLICY.

Port Angeles argues (Br., pp. 58-60) that the non-duplication rule in effect discriminates against CATV subscribers since the duplicating signals of KIRO-TV and KING-TV, in Seattle, are available off the air in Port Angeles, whereas they would not be available to subscribers on the cable because subscribers generally remove their roof top antennas when they are hooked up to the cable system. Port Angeles also notes that KIRO-TV operates a translator station in Port Angeles, which rebroadcasts the KIRO signals.[15/]

We think it plain there is no discrimination. Switching equipment is readily available which permits cable subscribers to retain their own private antennas, and to switch to that mode of reception if they wish. Furthermore, the KIRO-TV translator in Port Angeles operates on a UHF channel, and consequently poses very little threat to VHF station KVOS-TV. The cable, however, when installed in a home, provides KIRO signals of better than off-the-air strength which are receivable on all television receivers, and consequently poses a much more substantial threat to KVOS-TV.[16/] In any event, the suggestion that CATV subscribers

15/ A translator is an auxiliary installation usually used to boost a distant television signal in a limited area, and to present it off the air on a channel different from that on which the signal is initially broadcast.

16/ In the Second Report and Order, at 2 F.C.C. 2d 759, the Commission considered the question of translators and nonduplication, and determined that UHF translators, such as that involved here, should not be subject to nonduplication requirements because of the disparity in the likely impact. However, the entire subject of translator duplication is now before the Commission. Notice of Proposed Rule Making, FCC 67-706, June 14, 1967.

are seriously injured by the denial of the opportunity to see the very same programming from a Seattle station which is available on the cable from a Bellingham station, is hard to credit.

Port Angeles also contends (Br., pp. 60-61) that the incidental loss of Seattle originated advertising in those portions of the Seattle programming which must be deleted amounts to a violation of the antitrust laws, specifically 15 U.S.C. sections 1 and 2, and the Commission's own policies. Port Angeles has totally failed to demonstrate that this is so, and, in view of all the foregoing it is patently a trivial argument. Nor is the fact that the rule is operative only upon request of the local broadcaster of any significance. The fact is that the Commission's determination to permit the operation of the non-duplication rule to turn on a request for the protection by the local station involved represents a deference to private arrangements between broadcasters and CATV operators. In effect, the rule as currently written is less harsh than it would be if operation of the rule were entirely automatic. Petitioner's complaints on this score are thus unpersuasive.

Port Angeles also appears to argue that copyright considerations should preclude the CATV's adherence to the rules. However, as the only question presented by the present case is whether the system is required to delete certain programming, we are at a loss to understand the thrust of petitioner's argument. Petitioner does correctly state that the Commission

may in the future modify its rules in light of the Supreme Court's consideration of the copyright issue in the pending litigation.[17/] Until and unless they are modified, however, Port Angeles is bound by them in their present form.

CONCLUSION

For all the foregoing reasons the action below should be affirmed.

Respectfully submitted,

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17/ United Artists Television, Inc. v. Fortnightly Corporation, 377 F.2d 872 (2nd Cir., 1967), Fortnightly Corporation v. United Artists Television, Inc. on certiorari before the Supreme Court (Case No. 618), October Term, 1968.

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Nothwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicat-

ing signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

[*§ 74.1103(a) and (b)(3) amended, (b)(4) adopted eff. 2-28-67; III(64)-16*]

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William L. Fishman